The Indiana Prosecutor

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Ethics and the Media

Below is a letter to the editor written by Don Lundberg in support of Prosecutor David Daly from Randolph County. Daly found himself prosecuting a criminal defense attorney, Donald McClellan, for possession of cocaine, as a class D felony. The defendant was offered a plea agreement which he accepted and filed with the court. Prior to sentencing, a newspaper reporter attempted to obtain the details of the plea agreement. When the Prosecutor did not reveal the contents of the plea he received negative press. Mr. Lundberg responded with the following editorial:

Regarding the recent editorial: "Randolph citizens deserve some answers." I read this piece with interest. I would like to comment on your characterization of the decision to not make the plea agreement public as unethical. In fact, the ethical considerations might cut the other way. Indiana Code 35-35-3-3 provides that the content of a plea agreement shall not be a part of the official record unless the court approves the agreement. This might seem unfair, especially to a news organization committed to shining the light of publicity on any and all information of public interest, but hear me out.

There's another side to this story that involves an important question of ethics – legal ethics. Our system of criminal justice is based on the idea that a defendant is innocent until proven guilty. Proof of guilt includes the right to a trial by jury. A legal ethics rule, Rule of Professional Conduct 3.6, requires prosecutors to avoid publicizing information about the accused that would be inadmissible at trial or otherwise prejudice the defendant's right to an impartial trial. Why is that? Because doing so would threaten the defendant's fundamental right to an impartial jury. In the case in question, what jury member who had been exposed to publicity about a guilty plea wouldn't assume, without regard to the facts or law, that the defendant, now desiring a trial by jury, is, in fact, guilty?

Perhaps the situation you described exemplifies a clash of values, the press's legitimate interest in reporting matters of public interest versus the criminal justice system's commitment to due process and fundamental fairness for defendants. It demeans the latter important values to characterize as unethical the acts of individuals who honor them.

Donald Lundberg
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Indiana Supreme Court Disciplinary Commission

Inside this Issue

United States Supreme Court Recent Decisions

- Spectator conduct may affect defendant's Sixth Amendment Rights but not this time

Carey v. Musladin, 127 S.C. 649 was decided on December 11, 2006. All justices agreed in result with three writing concurring opinions.

Mathew Musladin shot and killed Tom Studer, a friend of Musladin's ex-girlfriend. During the fourteen day trial the Studer family while seated in the spectator seats behind the prosecution table, wore buttons containing the victim's picture. Defense counsel objected to the buttons claiming that his clients Sixth Amendment right to a fair trial was violated by wearing the buttons which he claimed could be seen by the jury. The trial court found no probable prejudice to the defendant and allowed the buttons.

California's appellate court stated it did not endorse the wearing of buttons in trial but also found that they did not violate the defendant's right to a fair trial. Under the circumstances of this case, the court found "the simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member." After exhausting his state appeal, Musladin filed for a Writ of Habeas Corpus with the Federal District Court.

The test before the court was not whether the wearing of the buttons was inappropriate, but whether the California Court of Appeal's ruling was contrary or an unreasonable application of clearly established federal law as established by the United States Supreme Court. The Ninth Circuit Court of Appeals found that it was contrary to established federal law and issued a Writ of Habeas Corpus.

In reversing the Ninth Circuit, the U.S. Supreme Court found that it had never established federal law that pertained to spectator conduct in trial, therefore, there was no violation of clearly established federal law. In its analysis, the Court pointed out that there were provisions for government sponsored action such as requiring the defendant to wear jail clothes. In circumstances where government action threatens the defendant's right to a fair trial, the government has a duty to show that an essential state policy or interest justifies their actions. However, the Supreme Court has never addressed whether courtroom conduct by a private actor could deprive a defendant of his Sixth Amendment rights. Therefore, Musladin could not meet his burden of showing the state court misapplied established Supreme Court precedent. The Court of Appeals opinion was vacated and Musladin's conviction was left to stand.

Justice Thomas, writing for the majority, stopped short of providing any guidance for when or if spectator conduct could affect the defendant's Sixth Amendment rights. Justice Stevens and Justice Souter, in concurring opinions, made it clear that they believe spectator conduct can form the basis for a right to fair trial challenge. Justice Souter indicated that trial judges have a duty to "control their courtroom and keep it free from improper influence." While none of the Justices gave specific instances of unacceptable conduct, they left open the door to debate what conduct could potentially influence a jury and lead to a reversal.

Indiana Supreme Court Recent Decisions

- Amending Charging Informations? Must be done thirty days prior to omnibus date.

On January 16, 2007, the Indiana Supreme Court decided *Fajardo v. State,* ____ N.E.2d ___ (Ind. 2007) reinterpreting twenty years of case law. Fajardo was originally charged with one count of Child Molesting. After a deposition, the State moved to add an additional count of molest based on an additional incident. Unfortunately, the deposition occurred a day after the omnibus date and therefore the amended charge was filed belatedly. The trial court, however, granted the motion to amend the information and set a trial date for four months later. Discovery continued, a Child Hearsay hearing was held and eventually the defendant was convicted of both counts at trial.

Fajardo challenged his conviction, arguing to the Court of Appeals that the trial court had erred in allowing the State to amend the information and add the additional count of A felony molest. The Court of Appeals affirmed the conviction in a memorandum decision. The Supreme Court granted transfer.

Indiana Code 35-34-1-5 allows for amending informa-

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tions under certain circumstances. Where there is an immaterial defect the state can amend at any time. When the amendment is a matter of substance or form the information may be amended up until thirty days prior to the omnibus date if the charge is a felony and fifteen days before the omnibus date if the charge is a misdemeanor. There is one other limitation found in subsection (c) which allows the prosecutor to amend an information at any time when the amendment is "in respect to any *defect, imperfection, or omission in form* which *does not prejudice the substantial rights* of the defendant," (emphasis added).

The Defendant raised two arguments. First that the amendment, if it was an immaterial defect, prejudiced his substantial rights and therefore should have been prohibited. Secondly, he argued that adding an additional count was a matter of substance, therefore, the State was limited to amending up until thirty days before the omnibus date.

Justice Dickson, in writing for the Court, noted that the Court of Appeals correctly found that the amendment was one of substance and not form. But the Court failed to apply the thirty day time limitation. Instead the Court of Appeals applied the language of subsection (c) and found that the defendant's rights were not substantially violated, therefore, they affirmed the trial court decision. He noted that the distinction between matters of substance and those of form is the crucial factor in determining when an amendment may be allowed. A review of case law indicated an inconsistent approach which the court clarified in this decision.

In analysis, the Supreme Court applied the rules to differentiate amendments in substance from those of form. "An amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime." *McIntyre v. State*, 717 NE2d 114, 125-26 (Ind. 1999). In applying the rule, the court found that because the time frame of the second charge covered a larger time frame then the first and another sex act, Defendant's evidence addressing the original charge would not be "equally applicable" to defending the new charge. Additionally, the new count alleged the commission of a separate crime, which was essential to making a valid charge of the crime. Therefore the amendment was a change in substance rather than form.

Since the charge was not amended within 30 days before the omnibus date, the Supreme Court vacated Count Two, Class A felony Child Molest.

- Causation in OWI Cases

Abney v. State, 858 N.E.2d 226 (Ind. Ct. App. 2006). On July 9, 1999, at 2:56 a.m., the Marion County Sheriff's Department received a call reporting an accident. The caller also reported a body later identified as Jon Heffernan lying in the center turn lane of the 7000 block of Rockville Road in Marion County.

The evidence showed that Mr. Heffernan was riding home from work on his bicycle as Lanny Abney was driving home after having several drinks with a friend. Abney was traveling approximately 57 M.P.H. and struck Mr. Heffernan from behind, killing him. Mr. Heffernan's cause of death was a fractured neck occurring on "initial impact with a car."

Abney continued to drive west on Rockville Road after hitting Mr. Heffernan. Danville Officers James Anderson and Dwight Simmons observed Abney driving through Danville on his way home. Abney's vehicle had extensive front end damage, the windshield was shattered, the hood and top of the car were caved in, and the airbag had been deployed. Abney had to navigate the car with his head out of the driver's side window. Officers pulled behind Abney and initiated a traffic stop.

When Abney exited the car, he was unsteady on his feet, he smelled of alcohol, his speech was slurred, and his eyes were glassy and bloodshot. Abney admitted that he had struck something with the car, but stated that he did not know what he hit. DNA samples taken from Abney's car later confirmed that his vehicle struck Mr. Heffernan.

Officer Simmons read the implied consent warning to Abney and he agreed to take a blood test. Officer Simmons transported Abney to the Hendricks Community Hospital for a chemical blood test. Once at the hospital, Abney refused to submit to the blood draw. Marion County Deputy William Atkinson arrived at the hospital and attested to the requirements of IC 9-30-6-6(g) before requesting a warrantless blood draw. Abney's blood alcohol content was 0.21 percent. Abney was tried and con-

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victed of Operating a Vehicle While Intoxicated Causing Death, a Class C felony and Operating a Vehicle with BAC of .10% or More, a Class C felony. Both were enhanced to Class B felonies as a result of a prior conviction.

At trial, Abney argued that another vehicle struck Mr. Heffernan first, throwing his body into Abney's car. The State tendered, and the trial court accepted, an instruction on causation that stated, "If you find that the Defendant's driving conduct was a contributing cause to the accident that produced the death of the victim, the State has proved the element of 'causation.'" Abney argued on appeal that this instruction misstated the level of causation that is necessary for OWI Causing Death.

The Court of Appeals held that State's tendered instruction was erroneous. The Court stated, "instead of a contributing cause being the level of causation required, we hold that a substantial cause is required... the jury instructions should reflect that if the conduct of the defendant was a substantial cause of the accident and the resulting death, the State has proven the element of causation." *Abney v. State*, 758 N.E.2d 72 (Ind. Ct. App. 2001).

The Indiana Supreme Court granted transfer, and on April 26, 2002, the Court agreed with the Court of Appeals, reversed Abney's convictions and remanded his case for a new trial. The Court stated: "If the driver's conduct caused the injury, he commits the crime; if someone else's conduct caused the injury, he is not guilty. That is simply a shorthanded way of stating the well-settled rule that the State must prove the defendant's conduct was a proximate cause of the victim's injury or death." *Abney v. State*, 766 N.E.2d 1175 (Ind. 2002).

Prior to his second trial, Abney filed a motion to suppress the blood alcohol results. Specifically, Abney argued that the taking of his blood without consent violated his rights under the Fourth Amendment. He also argued that IC 9-30-6-6(g) only applies where a physician refuses to draw a blood sample. The trial court held a hearing and denied Abney's motion. The Court of Appeals accepted jurisdiction of the interlocutory appeal. The Court of Appeals affirmed the trial court's decision and held that IC 9-30-6-6(g) allows for a warrantless blood draw where the police have probable cause to believe that the defendant was operating a vehicle while intoxicated and was involved in an accident resulting in serious bodily injury or death. The Indiana Supreme Court granted transfer and adopted the opinion of the Court of Appeals. The Court held, "Indiana's implied consent statutes provide the State with a mechanism necessary to obtain evidence of a driver's intoxication in order to keep Indiana highways safe by removing the threat posed by the presence of drunk drivers. As the Court of Appeals has observed, Indiana Code 9-30-6-6(g) is designed as a tool to acquire evidence of blood alcohol content rather than as a device to exclude evidence. In our view, limiting Indiana Code 9-30-6-6(g) to those instances in which a physician refuses to draw blood is inconsistent with the intent of the implied consent statutes." *Abney v. State*, 821 N.E.2d 375 (Ind. 2005).

After a second jury trial, Abney was found guilty of Operating While Intoxicated Causing Death as a Class B felony. Abney again appealed. On December 13, 2006, the Indiana Court of Appeals issued an opinion affirming the conviction, and held that the evidence was sufficient to sustain Abney's conviction. In so holding, the Court outlined the evidence the State presented and noted "the absence of evidence to indicate that any other vehicles were in the subject location at the time of the accident." The Court declined to "reweigh the evidence presented to the jury, which primarily consists of evidence that Abney was the substantial, and indeed the only, cause of Heffernan's death." *Abney v. State*, 2006 Ind. App. LEXIS 2530 (Ind. Ct. App. 2006).

Abney's two trials and exhausting series of appeals resulted in a new standard of causation the State must prove and a definitive interpretation of Indiana Code 9-30-6-6(g). Most importantly, however, *State v. Abney* resulted in a conviction. Lanny Abney is currently serving a 15 year sentence at the Indiana Department of Correction with a projected release date of December 20, 2011.

- Forensic Diversion is not mandatory

Ruble v. State, ___ N.E.2d ____(Ind. 1/3/07). James Ruble plead guilty to operating a vehicle after his privileges had been suspended for life as a Class C felony. While he was eligible for placement in Forensic Diversion, the trial court elected not to place him in the program and gave him a partially executed sentence instead. Ruble appealed his sentence.

The Indiana Court of Appeals found that by statute, anyone who meets the eligibility requirements of the Forensic Diversion program must be placed in the program. The Indiana Supreme Court disagreed. Forensic Diversion provides a treatment based alternative to incarceration which is only an option for a trial judge. It was not the intent of the legislature to enact a statute which mandated placement in the program.